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SUPREME COURT, U.S.

NO. 80-5093

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

ANTOINE J. PAYNE,
Appellant

V.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE
TEXAS COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT

Randolph L. Schaffer, Jr.

3401 Louisiana, Suite 270
Houston, Texas 77002
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Counsel for Appellant

July, 1980

QUESTION PRESENTED

WHETHER A JURY INSTRUCTION BASED UPON A STATUTORY PRESUMPTION THAT THE DEFENDANT KNEW THAT THE PERSON ASSAULTED WAS A PEACE OFFICER IF THAT PERSON WAS WEARING A DISTINCTIVE UNIFORM INDICATING HIS EMPLOYMENT VIOLATES DUE PROCESS OF LAW.

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OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, which appears in the appendix hereto, is reported at 596 S.W.2d 911 (Tex. Crim. App. 1980).

JURISDICTION

The judgment of the Texas Court of Criminal Appeals affirming the conviction was entered on April 16, 1980. Notice of appeal to the Supreme Court of the United States was filed in the Texas Court of Criminal Appeals on May 14, 1980.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTE

U.S. CONST. amend. V and XIV, which provide in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law;

TEX. PENAL CODE ANN. §22.03(b) (1974):

> The actor is presumed to have known the person assaulted was a peace officer if he was wearing a distinctive uniform indicating his employment as a peace officer.

STATEMENT OF THE CASE

This appeal is from a state court conviction for deadly assault on a peace officer. The jury assessed punishment at twenty years

confinement in the Texas Department of Corrections.

The evidence demonstrated that late on the evening of September 29, 1974, two uniformed Houston police officers approached a building and saw two men removing furniture. The complainant announced that he was a police officer and to halt. The men ran from the building. He pursued them across a freeway and into an apartment complex. The complainant testified that he told appellant to throw up his hands, at which point appellant turned and fired three shots at him. The complainant was wounded, returned the fire and shot appellant. He admitted on cross-examination, when confronted with physical evidence indicating that spent hulls from his gun were found near the freeway, that he had fired two shots "up in the air" shortly after the chase began.

Appellant testified that he and a companion were burglarizing a building when someone came around the front of the building with a flashlight. He did not know who it was, so they ran toward the freeway. Appellant ran across the freeway, turned around and was shot in the private parts by a man who was on the feeder street. Appellant went over a fence and laid on the ground. He heard more shots, saw his companion throw down a gun and flee. Appellant picked up the gun and went to his brother's apartment, where he was subsequently arrested. Appellant denied having a pistol prior to the shooting, denied shooting the officer, and denied seeing a uniform.

The trial court instructed the jury that if the officer was wearing a distinctive uniform indicating his employment as a peace officer, the jury could infer that appellant knew that he was a peace officer. This instruction was based upon §22.03(b) of the Texas Penal Code, which provides that the actor is presumed to have known that the person assaulted was a peace officer if that person was wearing a distinctive uniform indicating his employment as a peace officer.

The court did not instruct the jury that before knowledge could be inferred from the fact that the complainant was wearing a uniform, the jury must find from the evidence beyond a reasonable doubt that appellant saw the uniform.

Appellant did not challenge the constitutionality of the statutory presumption in the trial court, but raised the issue for the first time on direct appeal to the Texas Court of Criminal Appeals. Appellant argued that the jury instruction applying this statutory presumption was fundamentally defective because the statutory presumption was unconstitutional. He contended that there was no rational connection between the mere fact that the victim was wearing a distinctive uniform and the fact that the actor knew his status, unless the presumption were to include the additional proved fact that the actor saw the uniform. The jury instruction presumed that appellant saw both the officer and his distinctive uniform, and the evidence on this issue was controverted. The court did not instruct the jury that they must find beyond a reasonable doubt that appellant saw the uniform before they could infer or presume that he knew at the time that the complainant was a peace officer.

The Texas Court of Criminal Appeals considered and expressly rejected this federal constitutional claim. The court reasoned that the presumed fact of appellant's knowledge that the complainant was a peace officer more likely than not came from the proven fact that the complainant wore a uniform under circumstances that imparted that knowledge to appellant. The court concluded that it would have been superfluous to charge that appellant saw the uniform, for under the surrounding circumstances the jury was justified in inferring that knowledge was based upon the empirical evidence of sight. The court held that the statute was not unconstitutional because it lacked the element of seeing. Payne v. State, 596 S.W.2d 911, 915 (Tex. Crim. App. 1980).

THE QUESTION IS SUBSTANTIAL

The prosecution must prove beyond a reasonable doubt every fact necessary to constitute the offense charged. In re Winship, 397 U.S. 358 (1970). A statute which permits the jury to presume an element of the offense may be unconstitutional unless there is a rational connection between the facts proved and the fact presumed. Leary v. United States, 395 U.S. 6, 33 (1969). The permissive presumption on which the jury was instructed in the case at bar was unconstitutional as applied because, under the evidence, there was no rational way that the jury could make the connection permitted by the inference. Cf. Ulster County Court v. Allen, ___ U.S. ___, 60 L.Ed.2d 777, 792 (1979). As a consequence, the jury instruction based upon this unconstitutional statutory presumption denied appellant due process of law.

The threshold question is whether a reasonable jury could have given the presumption a conclusive or persuasion-shifting effect. Sandstrom v. Montana, ___ U.S. ___, 61 L.Ed.2d 39, 48 (1979). Where the challenged instruction has the effect of relieving the State of the burden of proving an element of the offense, it violates the defendant's right to due process of law.

Section 22.03(b) of the Texas Penal Code unequivocally shifted the burden to appellant to prove that he did not know that the complainant was a peace officer. Appellant addressed that issue when he testified that he did not see a distinctive uniform at the time in question. The State had only to show that the complainant was in fact wearing a uniform to invoke the permissive presumption that appellant knew that he was a peace officer. This improperly enabled the State to prove the mens rea requirement.

A presumption which permits a jury to find knowledge or intent

from an isolated fact has the effect of prejudging a conclusion which the jury should reach of its own volition. Morissette v. United States, 342 U.S. 246 (1952). Evidence that the complainant was wearing a distinctive uniform, without more, does not support a presumption that the actor knew that the complainant was a peace officer. Knowledge of the identity of the complainant as a peace officer is an essential element of the offense of deadly assault on a peace officer. The jury should not be instructed on a presumption of knowledge based upon the mere fact that the complainant was wearing a distinctive uniform absent a further requirement that the jury find beyond a reasonable doubt that appellant saw the uniform.

The statutory presumption of §22.03(b) must be regarded as irrational or arbitrary unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved facts on which it is made to depend. Leary v. United States, supra. The flaw in this presumption is that it does not require proof that the actor saw the person assaulted, or more importantly, saw the uniform. Neither the statute nor the jury instruction required that the jury find that appellant saw the uniform before the jury would be warranted in presuming that he knew that the complainant was a peace officer. Absent some showing that appellant saw the uniform, the inference of knowledge from proof that the complainant was wearing a uniform is too arbitrary to pass constitutional muster.

An actor who fires shots blindly into the dark of night should not be presumed to know that his victim is a peace officer merely because the victim wore a distinctive uniform, absent proof that the actor saw the uniform. There is no rational connection between the mere fact that the victim is wearing a distinctive uniform and the fact that the actor knew his status, unless the presumption includes

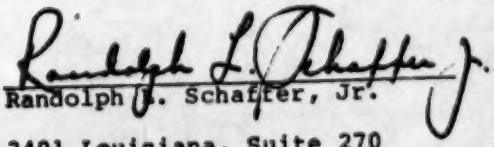
the additional proved fact that the actor saw the uniform. The failure of §22.03(b) to require proof of such a fact causes the statute to violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The jury instruction applying this statutory presumption was consequently fundamentally defective. The instruction presumed that appellant saw both the complainant and his distinctive uniform, and the evidence on this was highly contested. The jury was not instructed that they must find beyond a reasonable doubt that appellant saw the uniform before they could infer or presume that he knew at the time that the complainant was a peace officer. In the absence of this additional requirement of sight, the presumption was at best meaningless and arbitrary and at worst confusing and prejudicial. The conviction predicated upon the application of this unconstitutional statutory presumption denied appellant due process of law.

CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,



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July 14, 1980

possibility of his receiving probation. We do not agree.

According to the provisions of the statute itself, this provision is only applicable when the trial court makes an *affirmative finding* and *enters* such finding on the judgment of conviction. The judgment of conviction in the instant case reflects no such affirmative finding, nor does the record in any other place. There is no such notation on the judgment of conviction. Accordingly, we cannot agree with the premise upon which appellant bases his ground of error, i. e., that he was ineligible for probation. This ground of error is overruled.

The judgment is affirmed.

Antoine J. PAYNE, Appellant,

v.

The STATE of Texas, Appellee.

No. 55811.

Court of Criminal Appeals of Texas, En Banc.

April 16, 1980.

Defendant was convicted in the 209th Judicial District Court, Harris County, Herbert W. Line, Special Judge, of deadly assault on a peace officer, and he appealed. The Court of Criminal Appeals, Onion, P. J., held that: (1) charge to jury that defendant could be found guilty if he knew or had been informed that victim was, at time of assault, a police officer did not propose fact situation for conviction different from that set forth in indictment; (2) charge to jury on presumption that defendant knew victim was peace officer if victim was wearing distinctive uniform indicating his employment as peace officer was not fundamentally defective; (3) medical evidence was sufficient to establish that police officer sustained serious bodily injury; and (4) evidence was sufficient to establish that officer was police officer of an incorporated city, so as to constitute him a peace officer.

Judgment affirmed.

1. Criminal Law ⇐814(1)

In prosecution for deadly assault on a peace officer, charge to jury that defendant could be found guilty if defendant knew, or had been informed that victim, at time of the assault was a peace officer did not propose fact situation for conviction different from that set forth in indictment alleging that defendant knew victim was peace officer, but merely added phrase that, historically, had been part of concept of knowledge on part of defendant however acquired, either actively or passively. V.T. C.A., Penal Code § 22.03(a); Vernon's Ann. P.C. art. 1147(1).

2. Criminal Law ⇐778(2)

In prosecution for deadly assault on a peace officer, charge to jury on presumption that defendant knew victim was peace officer if victim was wearing distinctive uniform indicating his employment as peace officer was not fundamentally defective even though jury had not been charged that defendant saw the uniform, where the presumed fact, i. e., defendant's knowledge that victim was peace officer, more likely than not came from proven fact that victim wore uniform under circumstances that imparted that knowledge to defendant. U.S. C.A.Const. Amends. 5, 14; Vernon's Ann.St. Const. art. 1, § 13; V.T.C.A., Penal Code §§ 2.05, 22.03(b).

3. Assault and Battery ⇐92(4)

In prosecution for deadly assault on a peace officer, medical evidence was sufficient to establish that peace officer sustained serious bodily injury occurring when defendant shot at peace officer. V.T.C.A., Penal Code § 1.07(a)(34).

4. Assault and Battery ⇐92(1)

In prosecution for deadly assault on peace officer, testimonial evidence by peace officer that he was employed as officer for city police department was sufficient to establish that officer was police officer of incorporated city, so as to constitute him a peace officer. V.T.C.A., Penal Code § 1.07(a)(25); Vernon's Ann.C.C.P. art. 2.12(3).

5. Criminal Law ⇐1043(1)

Defendant failed to preserve for review issue whether it was error to allow prosecutor to argue effect of law of parole to jury where defendant made objection to the argument but failed to pursue objection.

Randy Schaffer, court appointed on appeal only, Houston, for appellant.

Carol S. Vance, Dist. Atty., James C. Brough and Robert Ross, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON STATE'S MOTION FOR REHEARING

ONION, Presiding Judge.

The original panel opinion is withdrawn.

On original submission this conviction for deadly assault on a peace officer, where punishment was assessed at twenty (20) years' imprisonment, was reversed and remanded on grounds that the court's charge to the jury was fundamentally defective since it allowed the jurors to convict appellant on a theory not alleged in the indictment.

The offense of deadly assault on a peace officer is defined in V.T.C.A., Penal Code, § 22.03(a), in part as:

> "(a) A person commits an offense if, with a firearm or a prohibited weapon, he intentionally or knowingly causes serious bodily injury:
>
> "(1) to a peace officer where he knows or has been informed the person assaulted is a peace officer:
>
> "(A) while the peace officer is acting in the lawful discharge of an official duty; . . ."

The indictment charged that appellant did

> "with a pistol intentionally and knowingly cause serious bodily injury to Randy N. Mullens, hereafter styled the Complainant, a peace officer in the lawful discharge of an official duty, *knowing* at the time that the Complainant was a peace officer." (Emphasis supplied.)

The trial court charged the jury:

> "Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Antoine J. Payne, did, in Harris County, Texas, on or about the 29th day of September, 1974, with a firearm, to-wit, a pistol, intentionally or knowingly cause serious bodily injury to Randy N. Mullens, and that the said Randy N. Mullens was then and there a peace officer in the lawful discharge of an official duty, and that the defendant *knew, or had been informed*, that Randy N. Mullens was at that time a peace officer, you will find the defendant guilty." (Emphasis supplied.)

[1] Appellant makes a distinction in this statute that has not been found before, when he argues that "knowing" and "being informed of" present two different fact situations under which a person can be indicted, tried, and convicted.

As nearly as we have been able to trace, the precursor to V.T.C.A., Penal Code,

§ 22.03(a), originated in 1958 during the Seventh Legislature and stated:

"Article 488 shall hereafter read as follows:

"An assault or battery becomes aggravated when committed under any of the following circumstances:

"1. When committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty." 4 Gammel's Laws of Texas, Ch. 121, p. 170.

This statute was incorporated verbatim as 1859 Penal Code, Article 488, remained as written in the 1895 Penal Code, Article 601, occurred thus in the 1911 Penal Code, Article 1022, § 1, and in the 1925 Penal Code, Article 1147, § 1. In *Bristow v. State*, 36 Tex.Cr.R. 379, 37 S.W. 326 (1896), this court addressed the question of whether an indictment was defective under the former Penal Code, stating:

"By an inspection of said indictment, it will be seen that it fails to charge that the defendant knew, or that it was declared to him, that John McRae, the person alleged to have been assaulted, was an officer. It is true that in the first part of the indictment the allegation is made that said McRae was a bailiff of the grand jury and an officer, but, when the indictment comes to charge *knowledge on the part of the defendant*, it fails to allege that said McRae was known by the defendant to be an officer, or that he declared to the defendant that he was such officer. Under the decisions of this state in *State v. Coffey*, 41 Tex. 46, and *Johnson v. State*, 26 Tex. 117, it is held that this is an essential averment." (Emphasis supplied.)

Clearly, the court considered the statutory phrases "if it was known or declared to the offender" as "an essential averment" (singular) in charging "*knowledge* on the part of the defendant" (singular). The court did not recognize two distinct sets of circumstances. See also *Ford v. State*, 252 S.W.2d 948 (Tex.Cr.App.1952), where it was again held:

"Knowledge or notice to the offender that the person assaulted is an officer discharging an official duty is an essential element of the offense of aggravated assault, without which the assault would not be more than a simple assault." 252 S.W.2d at 948 949 [citing *Slaughter v. State*, 138 Tex.Cr.R. 85, 134 S.W.2d 285 (Tex.Cr.App.1939)].

The language of the present Penal Code shows simply a shift of the syntactic actor from its obscure and ambiguous position as the object of a preposition ("to the offender") in the old Penal Code to the subject of the adverbial clause ("where he knows or has been informed"). It is difficult to see how the present statute, as a direct descendant of Article 488 of the 1859 Penal Code and its subsequent codifications should now be interpreted to show a "legislative intent" that was construed nowhere in case law extending back into the last century.

In the instant case, therefore, the charge to the jury did not propose a fact situation for conviction different from that alleged in the indictment. It added a phrase that, historically, has been part of a singular concept of "knowledge on the part of the defendant" (*Bristow*, supra) however acquired, either actively or passively. The ground of error is overruled.

[2] In his second ground of error appellant argues that the charge to the jury was fundamentally defective because the jury was instructed on the presumption that appellant knew that the complainant was a peace officer if the complainant was wearing a distinctive uniform indicating his employment as a peace officer, when such a presumption is unconstitutional in violation of the due process clauses of the constitutions of the United States and the State of Texas.

The jury had heard evidence that when they saw appellant, officer Mullens and his

partner were in uniform and announced their presence, that during the chase Mullens never lost sight of appellant, that he was at one point eight or ten feet behind appellant, and that when he was shot three times he was five or six feet from appellant.

The statutes under consideration are V.T.C.A., Penal Code, § 22.03(b), which says

"The actor[1] is presumed to have known the person assaulted was a peace officer if he was wearing a distinctive uniform indicating his employment as a peace officer."

and V.T.C.A., Penal Code, § 2.05, which says

"When this code or another penal law establishes a presumption with respect to any fact, it has the following consequences:

"(1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and

"(2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows:

"(A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt;

"(B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find;

"(C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and

"(D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose."

The trial court charged the jury:

"If Randy N. Mullens was wearing a distinctive uniform indicating his employment as a peace officer that is a circumstance from which you could draw the inference and find that in the light of the surrounding circumstances shown by the evidence that the defendant knew that Randy N. Mullens was a peace officer.

"However, a jury is never required to make this inference, and it is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any such inference, which the law permits to be drawn, if Randy N. Mullens was wearing a distinctive uniform indicating his employment as a peace officer at the time of the assault, if any.

"If you believe from the evidence beyond a reasonable doubt that Randy N. Mullens, at the time of the assault, if any, was wearing a distinctive uniform indicating his employment as a peace officer, then you may draw from such finding the inference that the defendant knew that Randy N. Mullens was a peace officer, but you are not bound to draw any such inference, and even if you do draw any such inference, the State must still prove beyond a reasonable doubt each and all of this and the other elements of the offense charged.

"If you have a reasonable doubt that the defendant knew that Randy N. Mullens was a peace officer, or if you have a reasonable doubt as to any other element of the offense, you will find the defendant not guilty."

Appellant did not object to the charge but contends on appeal that it contained

[1] V.T.C.A., Penal Code, § 1.07(a)(2), now reads: "(2) 'Suspect' means a person whose criminal responsibility is in issue in a criminal action. Whenever the term 'actor' is used in this code, it means 'suspect'."

fundamental error because there was no rational connection between the fact proven (victim wearing uniform indicating peace officer) and the ultimate fact presumed (appellant's knowledge of peace officer), absent a statutory requirement that appellant saw the person assaulted or saw the uniform.

Appellant relies principally upon *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), wherein the United States Supreme Court held unconstitutional as a violation of due process of law a federal statute that authorized a jury to infer from a defendant's possession of marihuana that he knew that it had been illegally imported. There it was said that,

". . . a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36, 89 S.Ct. at 1548, 23 L.Ed.2d at 82.

In the instant case the "proved fact" is that officer Mullens was wearing a police uniform. Though it was at night, there was light coming from the warehouse when Mullens first announced himself to appellant; there were street lights illuminating the freeway access road and the freeway as Mullens chased appellant across those roadways, and at one point appellant turned and looked at Mullens some eight or ten feet away; then on the other side of the freeway the area by the Tierwater apartments was lighted when appellant turned and fired at Mullens from five to six feet away. It can be said with substantial assurance that the presumed fact, i. e., appellant's knowledge that Mullens was a peace officer, more likely than not came from the proven fact that Mullens wore a uniform under circumstances that imparted that knowledge to appellant. It would have been superfluous to charge that appellant saw the uniform, for under the surrounding circumstances of the case the jury was justified in inferring that knowledge was based upon the empirical evidence of sight. The statute is not flawed because it lacks the element of seeing. The ground of error is overruled.

[3] In his third ground of error appellant contends that the evidence was insufficient to establish that officer Mullens sustained serious bodily injury as alleged in the indictment.

V.T.C.A., Penal Code, § 1.07(a)(34), defines "serious bodily injury" as

" bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

The record reflects that officer Mullens was struck by three bullets fired by appellant; one shot pierced his bulletproof vest but did not enter his chest; another hit his side, deflected off a rib, went through the right lung and lodged in his spine; a third shot hit his left arm. Medical reports introduced into evidence without objection at trial show that Mullens was on the critical list when brought to Ben Taub Hospital on September 29, 1974. That same day he received a tube thoracostomy on the right side, to drain blood from the chest; 3100 cc's of blood were drained before bleeding stopped; he received six units of whole blood. One of Mullen's ribs was fractured. There was opacification noted on the right lung field due to hemothorax; there was also a contusion of the lung in that region. The bullet next to his spine was removed after Mullens was transferred to St. Joseph's Hospital. Appellant made no attempt to contradict any of this evidence. Viewing the evidence in the light most favorable to the verdict, we find it sufficient to establish that officer Mullens sustained serious bodily injury as alleged in the indictment. *See Hart v. State*, 581 S.W.2d 675 (Tex.Cr.App.1979), and *Wade v. State*, 572 S.W.2d 533 (Tex.Cr.App.1978). The ground of error is overruled.

[4] Appellant next contends that the evidence was insufficient to establish that officer Mullens was a police officer of an incorporated city, so as to constitute him a peace officer.

V.T.C.A., Penal Code, § 1.07(a)(25), defines "peace officer" as "a person so designated by the Code of Criminal Procedure, 1965." Then in Article 2.12(3), V.A.C.C.P., 'peace officers" are defined as including 'marshals or police officers of an incorporated city, town, or village."

Upon taking the witness stand Mullens stated that he was employed as an officer for the Houston Police Department. Though it would have been better practice for him to state that Houston is an incorporated city, such an omission was not reversible error. Just as this court judicially knows that Dallas is a city in Dallas County, so it also judicially knows that Houston is a city in Harris County. *Bell v. State*, 166 Tex.Cr.R. 340, 313 S.W.2d 606, 610 (1958). The ground of error is overruled.

[5] Appellant's last contention is that the trial court reversibly erred in allowing the prosecutor to argue the effect of the law of parole to the jury. The complained of argument occurred as follows:

"MR. ROSS [State]: Please keep in mind that the Board of Pardons and Paroles controls how long a person stays—

"MR. EPPS [Counsel for appellant]: Judge, we are going to object to that. It's improper, it's right in the charge.

"THE COURT: It's in the charge?

"MR. ROSS: The Board of Pardons and Paroles will tell this man how long he will stay in the Texas Department of Corrections. That's not for your consideration. So you're not to consider it or deliberate that issue. That's left solely up to the Board of Pardons and Paroles, and it will be based on his conduct, and their reviewing of that."

The trial court's response to appellant's objection neither sustained nor overruled the objection. It was incumbent upon counsel to pursue his objection until he received an adverse ruling. But the record shows no such further objection by counsel for appellant. Nothing is preserved for review. The ground of error is overruled.

The State's motion for rehearing is granted. The judgment is affirmed.

ROSEMONT ENTERPRISES, INC., Appellant,

v.

William R. LUMMIS, Temporary & Co-Administrator, Appellee.

No. A2244.

Court of Civil Appeals of Texas, Houston (14th Dist.).

Feb. 13, 1980.

Rehearing Denied March 5, 1980.

Temporary coadministrator of estate brought action on note. The Probate Court No. 2, Harris County, Pat Gregory, J., granted administrator's motion for summary judgment and directed issuance of writ of garnishment and maker appealed. The Court of Civil Appeals, Miller, J., held that: (1) court had jurisdiction over nonresident maker; (2) probate court had jurisdiction over the claim; (3) temporary coadministrator had been granted authority to bring suit on the note; and (4) affidavit which presented evidence excluded by the parol

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 55,811 styled:

Antonine J. Payne, Appellant

vs.

State of Texas, Appellee

the judgment of the 209th District Court of Harris County, Texas, was affirmed on April 16, 1980 and on May 2, 1980 the mandate of this Court issued.

Therefore, with the affirmance, this cause was disposed of by this Court on April 16, 1980, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

Witness my hand and the seal of said Court, at my office in Austin, Texas, this the 7th day of July, 1980.

Thomas Lowe, Clerk
Court of Criminal Appeals

RECEIVED IN
COURT OF CRIMINAL APPEALS

MAY 14 1980

Thomas Lowe, Clerk

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

ANTOINE PAYNE	§	
	§	
VS.	§	CAUSE NUMBER 55811
	§	
THE STATE OF TEXAS	§	

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES ANTOINE PAYNE, appellant in the above styled and numbered cause, and hereby gives Notice of Appeal to the Supreme Court of the United States from the final order of the Texas Court of Criminal Appeals, affirming the judgment of conviction entered herein on April 16, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Respectfully submitted,

Randy Schaffer

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Houston, Texas 77002
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Attorney for Appellant,
ANTOINE PAYNE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of appellant's Notice of Appeal was delivered to JAMES C. BROWN, Assistant District Attorney for Harris County, Texas, and GERALD C. CARNETT, Assistant Attorney General, by depositing same in a United States mail box with first class postage, prepaid, by certified mail, return receipt requested, on the 12 day of May, 1980. I further certify that all parties required to be served have been served.

Randy Schaffer
Randy Schaffer